IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETTY J. MORRISON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-27
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CINDRICH, District Judge December _____, 1998

This is an action for wrongful levy under 26 U.S.C. § 7426(a). The court heard evidence and argument during a bench trial from March 9, 1998 to March 12, 1998. The parties' proposed findings of fact and conclusions of law were filed May 4, 1998. Before trial, the parties stipulated to the admissibility of essentially all the relevant documents and many of the transactions in question. Doc. Nos. 31 and 33. Pursuant to Federal Rule of Civil Procedure 52, the court makes its findings of fact and conclusions of law.

I. Findings of Fact

The government's evidence about the relevant events of this case, which constitutes much of what appears below, is diffuse rather than obviously connected. The link among this evidence, consistent with the government's theory of the case, is simply the involvement of Jack L. Armstrong, the delinquent taxpayer.

Betty Morrison's Background

1. Betty Morrison was 77 years old at the time of trial. Her husband Ben, a former steelworker, died in 1990. They had no children. They lived, and Morrison still lives, in rural Pennsylvania. Betty Morrison had open heart surgery in September 1996.

2. Though Ben Morrison worked at a steel mill, and Betty Morrison did not work outside the home, they received, or Betty Morrison received after Ben's death, over one million dollars from gifts, bequests, interest, wages, and other benefits from 1978 to 1995.

3. Betty Morrison was not an experienced investor. After Ben Morrison died, she obtained some financial and estate planning advice from an attorney. One bit of advice she received was to place the names of potential beneficiaries on her bank accounts to reduce their inheritance tax when she died.

4. Jack L. Armstrong is Betty Morrison's nephew. He and his family -- his wife, Coralee Armstrong, and their children, Eric, Mark, Wendi, Luke, and Jack L. Armstrong, II, -- were described by Betty Morrison as her closest relatives. Luke Armstrong is not involved in the transactions in question.

Relevant Financial Transactions

5. After receiving certain benefits arising out of her husband's death, from February 1991 to through June 1992 Betty Morrison purchased a series of $100,000 certificates of deposit by rolling over her initial deposit. The CDs were opened as joint accounts in the names of Betty J. Morrison or Jack L. Armstrong, II, or Wendi B. Armstrong, or Eric R. Armstrong, or Debbie Armstrong. Debbie Armstrong is Eric Armstrong's wife.

6. In June 1992, Betty Morrison purchased a 10 year subordinated note, No.

50-00-2161-C, from F.N.B. Consumer Discount Company for $100,000. Plaintiff's Exhibit A. Morrison bought the note with the principal of the CDs she had been rolling over. She purchased the note because it paid her higher interest than the CDs. The names on the note are "Betty J. Morrison or Jack L. Armstrong, II, or Wendi B. Armstrong or Eric R. Armstrong or Mark H. Armstrong or Debbie Armstrong or Sharon J. Armstrong or Jack L. Armstrong P.O.A." Sharon Armstrong is Jack L. Armstrong, II's wife.

7. Morrison agreed to have "Jack L. Armstrong P.O.A.," meaning power of attorney, included on the note because he lived close by and he could take care of her business when she was not able. 3/9/98 Trans., Doc. No. 36, at 67. Morrison also expected him to act on behalf of the others named on the note because they did not live locally. Morrison was the only person who contributed anything to the note. Id. at 70.

8. Creation of a power of attorney was another piece of advice from the attorney she consulted. Morrison gave Jack L. Armstrong a general power of attorney and power of attorney over her bank accounts. Morrison trusted Jack L. Armstrong to handle her finances. Id. at 97.

9. In August 1992, Jack L. Armstrong opened F.N.B. Consumer Discount Company Account[1] No. 200-03471-D in the names of Wendi B. Armstrong, Jack L. Armstrong, II, Sharon Armstrong, and Betty J. Morrison. The account was funded with an initial deposit of $60,000.

10. In November 1991, F.N.B. Consumer Discount Subordinated Note No. 50-

[1] These accounts are sometimes referred to by the parties as "DCA" accounts, which stands for daily cash account.

00-1379-C was purchased in the principal amount of $65,000 in the names of Betty J. Morrison or Jack L. Armstrong, II, or Wendi B. Armstrong or Eric R. Armstrong or Debbie Armstrong. In November 1992, Betty Morrison redeemed the note and transferred the proceeds to F.N.B. Consumer Discount Company Account No. 200-03471-D. From May 1993 to June 1995, Jack L. Armstrong made seven withdrawals from this account totaling $79,917. These withdrawals included $10,000 for the wife of a private investigator in Texas that Mark Armstrong had employed in his child custody battle, and more than $44,561 for the purchase of a house for Jack L. Armstrong's parents. Jack L. Armstrong's father is Betty Morrison's brother.

11. In June 1995, Jack L. Armstrong opened F.N.B. Consumer Discount Company Cash Account No. 200-05252 in the names of Betty Morrison, Mark H. Armstrong, Eric Armstrong, Debbie Armstrong, Jack L. Armstrong, II, Sharon Armstrong, and Jack L. Armstrong, P.O.A. Jack L. Armstrong made five withdrawals from this account in 1995 totaling $23,742.16.

12. Jack L. Armstrong opened F.N.B. Consumer Discount Company Account Nos. 200-3109-D and 200-3190-D in the names of Wendi B. Armstrong, Jack L. Armstrong, II, and Jack L. Armstrong, P.O.A., in October and November 1991, respectively. From July 1992 to June 1995, Jack L. Armstrong made 16 withdrawals for a total of $25,645.43 from account no. 200-3190-D. Wendi B. Armstrong's name was removed from the account in January 1995.

13. In September 1994, Jack L. Armstrong opened F.N.B. Consumer Discount Company Account No. 200-04768 in the names of Sharon Armstrong, Jack L. Armstrong,

II, and Jack L. Armstrong, P.O.A. in the amount of $26,081.60. This amount was a bonus from Jack L. Armstrong, II's employment as a physician.

14. In October 1994, Jack L. Armstrong withdrew $26,099.48 from Account No. 200-04768 and deposited the amount into an F.N.B. Consumer Discount Company Subordinated Note No. 40-00-4871. The note was purchased in the names of Wendi Armstrong or Sharon Armstrong. Defendant's Exhibit 19. Wendi Armstrong's Social Security Number was listed on the note. Because of this, she was later notified that she was liable for taxes due on the interest accrued under the note. She did not pay the tax due on the interest.

15. Jack L. Armstrong redeemed subordinated note no. 40-00-4871 in January 1995 and transferred the proceeds to F.N.B. Consumer Discount Company Subordinated Note No. 40-00-5258. That note was purchased in the names of Sharon H. Armstrong or Mark Armstrong. In April 1995, Jack L. Armstrong redeemed that note and transferred the proceeds into F.N.B. Consumer Discount Company Account No. 200-5112. This account is held in the names of Sharon H. Armstrong, Mark H. Armstrong, and Jack L. Armstrong, POA. Defendant's Exhibit No. 10. In June 1995, Jack L. Armstrong closed account no. 200-5112 and endorsed a check for the $33,407.19 proceeds to Ross Cardas, a local attorney who worked on the purchase of the house for Jack L. Armstrong's parents.

16. A deed for real property purchased in Mercer County Pennsylvania in December 1995 in the names of Mark H. Armstrong, Jack L. Armstrong, II, and Eric R. Armstrong lists the address of the grantees as 885 Hendersonville Road, Stoneboro, Pennsylvania. Defendant's Exhibit No. 26. That address is Jack L. Armstrong's address;

his sons no longer live with him. The same circumstances attach to a purchase of real property in Mercer County in July 1996. Defendant's Exhibit No. 27.

17. In November 1994, Jack L. Armstrong accompanied Betty Morrison to PNC Brokerage. A joint account was opened in their names. All the information pertaining to Jack L. Armstrong is accurate except for the social security number and date of birth on the account application; these belong to Jack L. Armstrong, II.

18. Jack L. Armstrong engaged in other financial transactions involving his family and others, such as joint control over a cemetery bank account, where he was a caretaker, the purchase of a vehicle, and his invasion of plaintiff's purse for money to pay for three dinners at an all-you-can-eat restaurant, about which evidence was presented. We find this evidence cumulative to the government's point, which we accept as a finding, that Jack L. Armstrong exerted or attempted to exert control over the financial affairs of relatives, and engaged in peculiar conduct in his own financial matters. We therefore find it unnecessary to recite details of these transactions.

Jack L. Armstrong's Background

19. From 1966 until June, 1984, Jack L. Armstrong worked as an accountant for General Motors Corporation at its plant in Lordstown, Ohio.

20. During the years 1981, 1982, 1983, in 1984, Jack L. Armstrong embezzled money from General Motors by stealing payroll checks made payable to other employees, and depositing the money in a bank account he controlled.

21. In or around June 1984, General Motors fired Jack L. Armstrong after it discovered the embezzlement scheme.

22. Following his dismissal, Jack L. Armstrong turned over to General Motors certificates of deposit purchased with the embezzled money, as well as the balance of a stock account held in Youngstown, Ohio. He also waived his right to accrued retirement benefits, and surrendered the sales proceeds of a company-owned automobile.

23. Jack L. Armstrong was criminally prosecuted and convicted by the United States for his embezzlement. He was sentenced to three years' probation.

24. The total amount of money Jack L. Armstrong embezzled from General Motors from 1981 to 1984 has never been known.

25. In 1987, the Internal Revenue Service assessed additional income taxes against Jack L. Armstrong and his wife Coralee Armstrong for the years in which Jack L. Armstrong carried out his embezzlement.

26. Revenue Officer Mary Arndt was assigned to collect unpaid federal income taxes assessed against Jack L. and Coralee Armstrong in September 1995.

27. In November 1995, Revenue Officer Arndt received a telephone call from Jack L. Armstrong's daughter, then married and using the name Wendi Riddle, advising her that her father placed money in the names of other persons to avoid paying his assessed taxes to the IRS. According to Riddle, Jack L. Armstrong was waiting for the statute of limitations on collection to expire (in 1997) before reclaiming the embezzled funds. Riddle also provided the IRS with relevant documents. Riddle had notified her family by letter in February 1995 that she would contact the IRS about her father's dealings because of his failure to repay her $10,000 she claims she was misled into handing over to him. Defendant's Exhibit No. 2.

28. As a result of the information provided by Riddle, Revenue Officer Arndt served notices of levy on F.N.B. Consumer Discount Company, First National Bank of Grove City, Pennsylvania, which happens to be in the adjoining building, and PNC Bank.

29. The IRS's levy attached to the following F.N.B. Consumer Discount Company accounts, which are the assets at issue in this case: Subordinated Note No. 50-00-2161-C; Cash Account No. 200-05229; Cash Account No. 200-05252; and Cash Account No. 200-04768. As a means of resolving a motion for preliminary injunction, the court approved a stipulation that these accounts shall remain at F.N.B. Consumer Discount Company undisturbed by either party pending the court's final judgment. Clerk's File, Doc. No. 4.

30. The United States offered no evidence that Jack L. Armstrong ever transferred money to Morrison. Morrison provided ample evidence that she obtained over one million dollars from other sources prior to the IRS's levy.

31. During trial, after relatives characterized Jack L. Armstrong's house as a "pig sty" and a "hog pen," the United States stipulated that Jack L. Armstrong and Coralee Armstrong do not lead an extravagant lifestyle, live in a home in a state of disrepair, and have not been seen spending large amounts of money. 3/10/98 Trans. at 86.

32. Betty Morrison's testimony is credible because of her age, her background, her history of frugality, her relative financial security, and her demeanor on the witness stand, in which she earnestly sought to provide evidence despite physical and emotional discomfort.

33. Jack L. Armstrong's testimony is not entirely credible because of his failure

to explain the reasons for or the circumstances underlying many of the transactions in which he engaged.

34. Wendi Riddle's testimony is not entirely credible because of her bias against her father, which caused her to threaten him with cooperation with the IRS over a debt he owed her, and which led in part to the levies in question.

II. Conclusions of Law

1. Section 6321 of the Internal Revenue Code provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321.

2. We have jurisdiction over this action by virtue of 26 U.S.C. § 7426(a)(1).[2]

3. The court reiterates that of the three cash accounts and one subordinated note levied upon by the United States, the government moved during trial for judgment on partial findings under Federal Rule of Civil Procedure 52(c) on two of the cash accounts, Nos. 200-04768 and 200-05229.[3] We granted the motion because the accounts are owned by persons not parties to this action, and Morrison conceded that she had no claim against the levy as it applies to those accounts. 3/10/98 Trans., Doc. No. 37, at 240.

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[2] The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206 §§ 3102 and 3106 (1998), amended 26 U.S.C. § 7426, but in ways that are not relevant to this case. The parties have not informed the court otherwise.

[3] When the government moved for judgment on partial findings, it identified this account as No. 200-05339. 3/10/98 Trans. at 239-240. The court granted that motion. The account number is actually 200-05229. See, e.g., Defendant's Exhibit 11a. It is that number on which judgment will be entered.

Accordingly, this decision concerns only the levy against the remaining cash account, No. 200-05252, and Subordinated Note No. 50-00-2161-C. We will sometimes refer to the account and the note as "the assets."

4. The right of a third party to challenge a wrongful levy is confined to those who have a fee simple or equivalent interest, a possessory interest, or a security interest in the property levied upon. Frierdich v. United States, 985 F.2d 379, 383 (7th Cir. 1993) (Posner, J.).

5. The parties have cited no case from the United States Court of Appeals for the Third Circuit establishing the burdens in a section 7426(a) action, and we have found none. Morrison relies on LiButti v. United States, 107 F.3d 110 (2d Cir. 1997), which canvasses other circuits for such authority (but which does not find it necessary to resolve certain inconsistencies it identified in the standard). We follow this standard as set forth below.

6. The standard applied by the district court in LiButti, and not altered by the court of appeals, has three steps. First, the plaintiff must prove an ownership interest in the property levied upon. 107 F.3d at 118. This is sensible as a prima facie requirement. If the plaintiff could not easily demonstrate an ownership interest at the outset of the trial, then trial of any other issue would be moot under section 7426(a).

7. Second, the United States has the burden of showing a nexus between the levied property and the delinquent taxpayer. This also is a sensible step. The taxpayer is not a party to the action, and the United States presumably would have such proof in its hands, which would be a prerequisite for its levy. By contrast, the plaintiff would not have

the same access to such proof. Again, if the government were unable to furnish sound evidence of a link between the delinquent taxpayer and the levied property, further judicial proceedings on the appropriateness of the levy would serve no purpose.

8. The Second Circuit in LiButti raised the question, in its view answered inconsistently by other circuits, whether this should be a burden of persuasion or production. 107 F.3d at 118. We find the government's burden to be one of production, since we interpret Congress to have intended to place the burden of persuasion on the plaintiff in cases under section 7426(a).

9. On the issue of the degree of the government's burden of production, we also find this burden to be one of substantial evidence. Id. In the words of our circuit, substantial evidence consists of more than a scintilla but less than a preponderance. Stunkard v. Secretary of Health and Human Services, 841 F.2d 57, 59 (3d Cir. 1988). It has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id. (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

10. Third, the plaintiff must then satisfy her ultimate burden of persuading the court that the levy was wrongful. Under IRS regulations, there are four grounds for determining whether a levy is wrongful. 26 C.F.R. § 7426-1(b); see also Sessler v. United States, 7 F.3d 1449, 1451 and n.2 (9th Cir. 1993) (commenting on regulation and collecting appellate cases that have endorsed it). One of the grounds is that the taxpayer had no interest in the property at the time the lien arose.

11. On the burden of proof issue the government relies on a variety of older

appellate and district court cases, but consistently cites Arth v. United States, 735 F.2d 1190 (9th Cir. 1984). Arth is subject to the criticism mentioned in LiButti, for example, that the Ninth Circuit shifts the burden of persuasion to the government in the second step of the court's analysis. 735 F.2d at 1193. As the court in LiButti points out, such a rule carries with it the risk of non-persuasion that is not appropriate to shift to the United States as the defendant. 107 F.3d at 118. In addition, Arth relies on Flores v. United States, 551 F.2d 1169, 1176 n.8 (9th Cir. 1977), which mentions a preponderance of the evidence standard for the government to meet. We would not have guessed that the government would invite the application of either of these rules, though in fairness, it probably does not. Instead, it cites Arth as supporting authority, but simply does not discuss the type of burden or the level of proof. Nonetheless, with the court following the standard stated in LiButti, the government may be in a better position than if Arth were followed, though this is coincidental, and certainly not a factor in our decision.

12. As the party making the claim in a civil action, Morrison ultimately must prove her claim by a preponderance of the evidence. A preponderance standard "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)).

13. It is undisputed that Morrison has an ownership interest in the levied note and cash account at issue because she contributed all the money for each asset, and her name appears in unqualified form on the related documents from which the court would

determine ownership.

14. We also find that the government has met its burden of showing by substantial evidence a connection between the taxpayer and the assets in question. Jack L. Armstrong's name appears on the ownership documents, as we mentioned in our brief denial of plaintiff's motion for summary judgment. Coupled with his unorthodox conduct in the handling of his and his family members' financial affairs, such as his inserting himself in their financial matters seemingly at whim, this evidence is sufficient to meet the government's burden.

15. The ultimate wrongfulness of the levy is another matter. The interests of the other persons whose names are on the assets in question lie at the heart of this case.

16. Rights in property subject to levy by the IRS are created by state law. The consequences of the operation of such rights, however, once determined to exist, are a matter of federal law. United States v. National Bank of Commerce, 472 U.S. 713, 722 (1985).

17. Pennsylvania has enacted a statute known as the Multiple-Party Accounts Act, 20 Pa. Cons. Stat. Ann. § 6301-6306. Section 6303(a) states that "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent." The statutory definitions of joint account, party, and financial institution cover the facts before us. To the extent they do not -- such as whether the note in question qualifies as an "account" under the statute -- we would follow the scheme of the statute by analogy.

18. The Superior Court of Pennsylvania has accepted as authority the official

comments to the Multiple-Party Accounts Act.

> [a]s explained in the official comment to Section 6303 there is an "assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit." However, all sums remaining at the death of one of the parties belongs [sic] to the surviving party, unless clear and convincing evidence of a different intent exists. 20 Pa.C.S.A. § 6304.

Wilhelm v. Wilhelm, 657 A.2d 34, 37 (Pa. Super. 1995). In Wilhelm, the plaintiff father funded joint accounts in excess of $100,000, including certificates of deposit, with his children, who then refused to turn over the documents necessary to give the father access to the accounts. Applying the Multiple-Parties Accounts Act, the court found that the children named on the account were obligated to provide access to the father, who had funded the accounts.

19. The official comment to section 6303 also states that:

> This section does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. . . . Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner as debtor or trustee. ...

20 Pa. Cons. Stat. Ann. § 6303 Official Comment.

20. In a levy proceeding, the IRS steps into the taxpayer's shoes, and acquires whatever rights the taxpayer possesses. National Bank of Commerce, 472 U.S. at 725.

21. After consideration of all the evidence, we find that Jack L. Armstrong was not an owner of the levied assets with an unrestricted interest. First, as stated above, we find that Jack L. Armstrong's children have rights to the note and cash account only consistent with the Multiple-Party Accounts Act. As a person who contributed nothing to the assets, this statute affords him no current unrestricted interest that arises out of the

appearance of his name on the relevant documents.

22. The government contends that Morrison made an inter vivos gift of the money in the assets to the other persons named on the relevant documents. It claims that there exists clear and convincing evidence of donative intent, delivery, and acceptance necessary to conclusively find a gift.

23. We disagree. Morrison's trial testimony [4] satisfactorily establishes her intent

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[4] Morrison testified at trial:

Q: Betty, when you established the note, the hundred thousand dollar note that's Exhibit A, did you intend to make a present gift to the people that were listed on the note?
A: Yes. After I was gone, it was theirs.

Q: So, they weren't to get the money at that point in time; were they?
A: No.

Q: They were to get it after you passed away?
A: Right.

Q: Now, you understood that there was a risk?
A: Yes.

Q: That any one of those could come in and sign out that money?
A: Right. I was told that.

Q: You didn't expect that to happen; did you?
A: No, I didn't.

Q: And that was the reason you listed those people on the note; correct?
A: Right.

Q: Because you trusted them?
A: I did.

3/9/98 Trans., Doc. No. 36, at 144-45. While Morrison's first utterance to the first question is affirmative, the context of the rest of her answers establishes that her "yes" was not

in obtaining the assets in question: a device to pass on these assets to the named parties after her death, which happens to be consistent with the statutory operation of the Multiple-Party Accounts Act.

24. A rebuttal from the government is that if the addition of the names to the account and note were not gifts, Morrison's expressed desire to save on inheritance taxes would be foiled. This is not the court's understanding of the tax consequences of the death of the contributor of funds to a joint account, and the government's conclusory assertion in its proposed findings gives us no reason to find otherwise.

25. This analysis does not take into consideration the designation of Jack L. Armstrong on the relevant documents as "P.O.A.," or a person with a power of attorney. The court in denying plaintiff's motion for summary judgment found that Jack L. Armstrong's name appeared on the note as an owner. After considering the evidence at trial, we find that the appearance of his name on the relevant asset documents does not establish him as a bona fide owner with a leviable interest in the assets.

26. The government's other principal contention at trial and in its proposed findings is that Jack L. Armstrong is an alter ego for the owners of the account. Thus, regardless of the source of the money in the levied assets, and notwithstanding the application of the Multiple-Party Accounts Act, the government urges the court to find that by application of the alter ego doctrine, the court should consider him as the beneficial owner of the levied assets. 3/9/98 Trans., Doc. No. 36, at 5.

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literal.

27. If the alter ego doctrine endows Jack L. Armstrong with ownership interests, it must occur pursuant to Pennsylvania law. The Third Circuit has authoritatively examined the doctrine.

> In Ashley v. Ashley, 482 Pa. 228, 393 A.2d 637 (1978), the Pennsylvania Supreme Court set forth, in a formula familiar to the courts of that state, the following principles which are to be applied when a trial court disregards corporate forms and, "piercing the corporate veil," holds that one individual or corporation is the alter ego of another:
>
> > Th[e] legal fiction of a separate corporate entity was designed to serve convenience and justice . . . and will be disregarded whenever justice or public policy demand and where rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless. . . . We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate entity may properly be disregarded.
>
> Id. 393 A.2d at 641 (citations omitted). Pennsylvania courts have largely embraced the flexible tenor of the Ashley standard, holding, for instance, that no finding of fraud or illegality is required before the corporate veil may be pierced, but rather, that the corporate entity may be disregarded "whenever it is necessary to avoid injustice." Rinck v. Rinck, 363 Pa. Super. 593, 526 A.2d 1221, 1223 (1987). . . . We have said that Pennsylvania alter ego law requires a showing that the subordinate company "acted robot- or puppet-like in mechanical response to the controller's tugs on its strings or pressure on its buttons." Culbreth v. Amosa (Pty) Ltd., 898 F.2d 13, 15 (3d Cir.1990).

Ragan v. Tri-County Excavating, Inc., 62 F.3d 501, 508 (3d Cir. 1995).

28. Both Ragan and the case on which it relies, Ashley, involved individuals and closely held corporations as alter egos. This doctrine is particularly applicable to corporate entities for reasons that should be apparent: since a corporation is a fiction, it is easier to manipulate, especially when it is closely held. The same cannot be said for individuals as alter egos for each other, since there will always be at least two human

voices to explain the relationship. This is not to say that a human being cannot be another's alter ego; it is only to say that the proving an alter ego relationship between individuals is likely to be more difficult.

29. The United States does not cite any Pennsylvania cases involving individuals as alter egos. It relies in particular on Lemaster v. United States, 891 F.2d 115 (6th Cir. 1989). That case involves review of imposition of sanctions in a case under 26 U.S.C. § 7246. There, a husband and wife transferred all their substantial personal, marital, and business assets to their son beginning at the time he was still in high school. This was about the same time the IRS began making assessments on the husband's and wife's tax liabilities. The assets of a trucking firm were transferred to the son and held in his name, even though the son had moved out of state to pursue a career as a hairdresser and had almost no familiarity with the trucking business. The husband and wife's household expenses were paid from the trucking company's account. The Sixth Circuit found the "sham ownership . . . so inartful and the scheme so transparent" that it affirmed sanctions. 891 F.2d at 120.

30. LiButti, cited above, involved a father's scheme to control a horse stable doing business as an unincorporated entity nominally run by his daughter. The Second Circuit concluded that the form of the entity would not prevent a finding of liability should equity lead to that result. 107 F.3d at 119. All evidence showing the connection between the father and the stable was relevant, and it was the daughter's burden to show that she was the true owner of the asset in question -- a valuable horse -- or that the horse was not one of the stable's assets.

31. Just so here. With regard to the note, Morrison has shown legitimate sources of money far in excess needed to make such a purchase. She traced the purchase of the note through a series of CDs which did not bear Jack L. Armstrong's name. No one other than Morrison carried out transactions with these funds. The note does include Jack L. Armstrong's name, but with the designation of an attorney-in-fact. Morrison undoubtedly is infirm, as the court observed at trial. She expressed a particular affection for Jack L. Armstrong's family, and credibly testified about the indispensable ingredient that would lead to such feelings, time spent together. Other relatives do not live in such proximity, and apparently do not have the time to dedicate to looking after her affairs that Jack L. Armstrong does. Thus, there is a legitimate basis for having such an arrangement with Jack L. Armstrong, despite his past criminal conduct. Unless we are prepared to find that Jack L. Armstrong has an unrestricted right to <u>any</u> of Betty Morrison's assets, or to those of his children, because these individuals' affairs are so completely intertwined -- which we are not prepared to do -- Betty Morrison has shown that Jack L. Armstrong does not have an interest in the note.

32. A similar conclusion applies to Cash Account No. 200-05252. Jack L. Armstrong was named on the account as "POA." Defendant's Exhibit 12a. There is no evidence that Jack L. Armstrong contributed to the account, although the name "Jack Armstrong" appears on a deposit slip for $12,000 on November 15, 1995. Attached to Defendant's Exhibit 12c. Five withdrawals in the name of "Jack Armstrong" were made from this account totaling $23,742.16. The evidence also shows withdrawals during the relevant time period by Mark Armstrong, "Jack or Sharon Armstrong," "Jack Armstrong II or

Sharon Armstrong," and Betty Morrison. Id.

33. Here Morrison cites her general approval of Jack L. Armstrong's handling of her affairs, 3/9/98 Trans. at 92; her authorization to make withdrawals from the account to assist Mark Armstrong with expenses of his child custody dispute, 3/9/98 Trans. at 84, including the $10,000 payment to the private investigator's wife, id. at 86; and the absence of any evidence from Revenue Officer Arndt that Jack L. Armstrong benefitted from any transactions out of this account, 3/11/98 Trans. at 68-70. It is true that Jack L. Armstrong was involved in more transactions involving this account than with the note. It cannot be said, however, that Jack L. Armstrong controlled the account to the extent that the others named thereon robotically responded to his wishes. As Morrison argues, even if it is shown that Jack L. Armstrong used the account, it does not necessarily follow that he is an owner, since his use could have been unauthorized or at least not closely monitored at the time. We therefore find that Morrison has shown that Jack L. Armstrong does not have a leviable interest in Cash Account No. 200-05252.

III. Conclusion

The government built its case for levy around the portrayal of Jack L. Armstrong as a schemer, a meddler, and a calculating and controlling person. To a large extent, it succeeded. The court is under no illusions about Jack L. Armstrong's conduct. He was dishonest at one point in his life, has not worked since that time, and has deeply scarred his family, with severely disruptive and shameful consequences that continue to the present.

All the circumstantial evidence the government mounted, however, did not change

the court's view of the four levied assets. Without sinister motive, it is conceivable that in rural Pennsylvania, an elderly widow with substantial funds would look to a nephew with whom she had a close relationship as someone to help her with her financial affairs. It is also conceivable that a father with children in other parts of the country might legitimately be involved in transactions of their property, despite certain evidence of illegitimate involvement. Given this scenario, which the whole of plaintiff's evidence supports, the court does not find Jack L. Armstrong has an interest in the levied assets.

An order consistent with these findings and conclusions will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETTY J. MORRISON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-27
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

O R D E R

In accordance with the accompanying Findings of Fact and Conclusions of Law, and pursuant to Federal Rule of Civil Procedure 54, with regard to F.N.B. Consumer Discount Company Account Nos. 200-04768 and 200-05229, the court finds in favor of defendant United States and against plaintiff Betty Morrison.

With regard to F.N.B. Consumer Discount Company Subordinated Note No. 50-00-2161-C and Cash Account No. 200-05252, the court finds in favor of plaintiff Betty Morrison and against defendant United States, and pursuant to 26 U.S.C. § 7426(b)(2)(A), directs the United States to lift its levy on these assets.

The Clerk is directed to mark this case closed.

SO ORDERED this _____ day of December, 1998.

_____

ROBERT J. CINDRICH
United States District Judge

cc:

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Elderkin, Martin, Kelly & Messina
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Rebecca Ross Haywood, AUSA

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